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Nos. 80-1208, 80-1471, 80-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 80-1208

NEW ENGLAND POWER COMPANY,
Appellant,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *ET AL.*,
Appellees.

NO. 80-1471

COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,
Appellants,

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
Appellees.

NO. 80-1610

DENNIS J. ROBERTS II, *ET AL.*,
Appellants,

v.

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ON APPEALS FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

BRIEF FOR UNAFFILIATED MASSACHUSETTS MUNICIPAL WHOLESALE CUSTOMERS OF NEW ENGLAND POWER COMPANY AS AMICI CURIAE

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STATEMENT OF INTEREST

The Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Company ("Customers") comprise twenty-three cities and towns in Massachusetts,[1] each of which operates a small electric system distributing to its consumers electricity purchased wholly or in part from the New England Power Company ("NEPCO"). Customers are also members of a public corporation created under the laws of the Commonwealth of Massachusetts to permit them to proceed toward the acquisition or construction, and operation, of power supply resources needed to meet the power needs of their citizen-customers.

Customers' interest in this proceeding is threefold. As wholesale customers of NEPCO, Customers will be asked to bear a substantial portion of any additional financial burden imposed upon NEPCO by the State of New Hampshire. As active competitors of NEPCO for the least expensive sources of power, Customers depend upon the free market in electric resources available through the New England Power Pool ("NEPOOL")[2] to permit entities to tailor their power supply mix to most economically meet their needs. Finally, as relatively small entities, Customers enjoy the substantial benefits of integration and coordination and economies of scale obtained by the members of NEPOOL. These benefits obtain because NEPOOL is able to secure the maximum efficiency for the New

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[1]The members of Customers are set forth in Appendix A.

[2]The NEPOOL Agreement has been approved by the Federal Energy Regulatory Commission ("FERC"). *New England Power Pool Agreement*, Opinion Nos. 775, 775-A (FPC 1976), *aff'd sub nom. Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978).

England region by operating and planning all electrical resources in the region on a unified, regional basis. This permits relatively small entities which could not, by themselves, finance and construct large, efficient units to do so on a joint ownership basis, thus permitting, for example, the Public Service Company of New Hampshire to be the lead participant in the Seabrook Nuclear Unit. Neither the free market in resources nor the benefits of integration and coordination and economies of scale could exist in an environment in which the several States in the region dealt directly, as in the case below, or indirectly to Balkanize the region by retaining the economic benefits of the electrical generation within that State for its own citizens. The Customers believe that the Order of the New Hampshire Public Utilities Commission ("Commission" or "PUC") strikes at the very heart of our interests.

SUMMARY OF ARGUMENT

The action of the New Hampshire Public Utilities Commission is contrary to the Constitution of the United States because it erects a direct and impermissible barrier to interstate commerce. The domestic needs adduced by New Hampshire are ineffective support for that State's attempt to appropriate a national resource to its local benefit. The law is clear that, no matter how legitimate the local interest, New Hampshire may not advance that interest by erecting barriers to interstate commerce.

The court below mistakenly relied upon Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b), as an affirmative grant of authority by Congress to New Hampshire to regulate or obstruct interstate commerce. The language and legislative history of Section 201(b) belie this interpretation and make clear that Congress

intended merely to preserve for the States whatever lawful authority may have existed in 1935. In 1935 it was quite apparent that the States were without legitimate authority to regulate, *a fortiori* prohibit, interstate commerce in electrical energy.

New Hampshire is disabled from regulating the exportation of hydroelectric energy generated within its borders by Part I of the Federal Power Act, 16 U.S.C. 792, *et seq.* By its action, New Hampshire seeks to impose a condition on the use of electrical energy generated at project works licensed by the FERC under Part I. This action is preempted because Congress, by Part I, has completely occupied the field of the licensing of hydroelectric projects, leaving no room for state regulation. New Hampshire's action also stands as a manifest obstacle to the accomplishment of the full purposes and objectives of Congress by inhibiting and disrupting the FERC's Part I licensing authority. New Hampshire's action, if permitted, would deprive the FERC of its existing authority to condition a license to require interstate interconnection, coordination and transmission by the licensee and others while permitting New Hampshire to arrogate to itself the authority effectively to determine who is to receive a license under Part I.

New Hampshire's action, if permitted, will inhibit the efficient and economic utilization of electrical generation and transmission throughout the New England region, even though national policy and the overall interest of consumers, including those in New Hampshire, lie in the encouragement of such coordination.

ARGUMENT

I.
THE STATE OF NEW HAMPSHIRE HAS ERECTED A DIRECT AND IMPERMISSIBLE BARRIER TO INTERSTATE COMMERCE.

The framers of the Constitution recognized that the national welfare would best be served by the free flow of interstate commerce. U.S. Const. Art. I, §8, cl. 3. Nowhere is the wisdom of that conclusion better illustrated than in the commerce in electrical energy and services. With the continued development and refinement of technology and dramatically escalating construction and fuel costs, the electric utility industry has generally come to recognize the benefits, indeed the practical necessity, of the coordination and integration of electric power facilities and service. Congress has long recognized and encouraged regional coordination and integration of such facilities and services. See Section 202(a) of the Federal Power Act, 16 U.S.C. 824a(a). Such coordination, however, is wholly dependent for its continued effectiveness upon the irrelevence, for this purpose, of "artificial" restraints such as the vagaries of ownership and governmental boundaries. Participants in the nation's major power pools, such as the New England Power Pool, plan and operate their facilities in concert for reliability and economic operation, without regard to ownership or state boundaries. By its decision denying export of the economic benefits of hydroelectric resources located within its borders, New Hampshire has reintroduced these restraints and erected an impermissible barrier to the free flow of electrical sales and service among the New England States.

This conclusion rests squarely upon long-standing interpretations of the permissible scope of state

interference with and burdens upon interstate commerce. When called to pass upon the constitutionality of an Oklahoma statute which prohibited the export of wild fish caught in Oklahoma waters, this Court, referring to *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), articulated the test of whether the burden imposed on interstate commerce was permissible under the Commerce Clause as:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma*, 441 U.S. 322, 336 (1979). New Hampshire has not sought or even purported to regulate evenhandedly, nor does its action have merely an incidental effect on interstate commerce. New Hampshire's action discriminates against interstate commerce by reserving to New Hampshire and denying to its sister States in New England the entire economic benefits of that portion of the relatively inexpensive hydroelectric energy generated within its borders.

The New Hampshire Commission sought to justify its action by citing current economic conditions within New Hampshire and New England which it contended merited this result. J.S. App. 29a-33a.[3] Specifically, the Commission noted, *inter alia*, that New Hampshire has recently had a population growth at a rate in excess of

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[3]The designation "J.S. App." refers to the appendix to NEPCO's Jurisdictional Statement in U.S. Sup. Ct. Docket No. 80-1208.

the New England region as a whole, with the result that "consumers in Massachusetts and Rhode Island have been receiving ever increasing levels of New Hampshire hydroelectric power per customer while New Hampshire has been receiving dramatically lesser [sic] power on per customer basis [sic] from units located within the State." J.S. App. 30a. The Commission found that NEPCO's control of 419.8 MW of New Hampshire hydroelectric capacity (as compared to Public Service Company of New Hampshire's 48 MW), while NEPCO serves only 6% of New Hampshire's population, and exports the remainder in interstate commerce, was "a major reason for higher costs per KWH of PSNH." J.S. App. 32a.[4] In light of these and the other factors noted, the Commission concluded that "there has been a demonstrated need for the hydroelectric power presently being exported outside the State and that it is reasonably required for use within the State." J.S. App. 35a. In sustaining these findings, the court below characterized the intent underlying the Commission's action succinctly: "Its purpose is to give New Hampshire the benefit of that power of which its residents now get only about six per cent." J.S. App. 11a. The law is clear that no such result is permissible.

The instant case is analogous[5] to *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). There, the State of West

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[4]Public Service Company of New Hampshire, of course, now receives 100 MW of capacity from four operating nuclear plants in Massachusetts, Connecticut, Maine, and Vermont, according to its Form 1 filed with the FERC (at p. 422). This out-of-state capacity substantially lowers PSNH's costs.

[5]The premise of New Hampshire's action is that the water power in question is a native New Hampshire resource. This premise is false. The Connecticut River, on which NEPCO's six New Hampshire projects are located, is navigable water of the United

Virginia, in the face of dwindling domestic gas reserves, sought to impose a statutory preference for domestic consumers, present and prospective, and to permit only surplus gas to be delivered to other States, such as Pennsylvania. The issue presented, therefore, was whether the enforced withdrawal of West Virginia gas from interstate commerce for the benefit of its own domestic consumers was such an interference with interstate commerce as to be forbidden to a State by the Constitution. The Court held:

> [I]t is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do.

262 U.S. at 597-598. The Court articulated the controlling considerations in its determination in the following manner:

> By the Constitution, Art. I, § 8, cl. 3, the power to regulate interstate commerce is expressly committed by Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation.

States. *Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380 (1941).* Rather than the possession of New Hampshire, the Connecticut River is "the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia,* 70 U.S. *(3 Wall.) 713, 725 (1866). See Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191, 201 (1967); *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334 (1958). New Hampshire seeks to appropriate a national resource which, through fortuity, is located within its borders.

Id. at 596.

In reaching this conclusion the Court addressed and rejected an argument remarkably similar to one here advanced by New Hampshire.

> Another consideration advanced to the same end is that the gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere.
>
> . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out.

Id. at 598-599.

Recent decisions of this Court make it clear not only that a State may not prefer local commerce over national or local consumers over national,[6] but also that

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[6]*Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977).

it may not discriminate against interstate commerce in order to protect what it may view as the financial well-being of its citizens. In *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), the Court passed on a challenge to the constitutionality of a New Jersey statute which provided, *inter alia*, that no solid or liquid refuse from neighboring States was to be imported into New Jersey until the head of New Jersey's Department of Environmental Protection determined that such importation posed no danger to the public health and safety. Several domestic landfill operators and large cities in adjacent States brought suit challenging the New Jersey statute on a variety of state and federal grounds. The Court addressed the dispositive question of whether the law created an impermissible burden on interstate commerce.

At the outset, the Court voiced its long-standing alertness to the evils of "economic isolation" and protectionism. Reasoning from its decision in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), the Court stated:

> Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.

437 U.S. at 624. The Court went on to find that the New Jersey law, on its face, discriminated against interstate commerce and was thus violative of the Commerce Clause. *Id.* at 627.

In reaching its decision in *Philadelphia* v. *New Jersey*, the Court directly confronted and rejected the asserted economic and health justifications underlying the New Jersey Act. The Court reviewed the New Jersey Supreme Court's findings that the existing site landfills would be exhausted within a few years; that the use of these sites or the development of new sites would exact a heavy

environmental toll on the State; that there was an absence of ready methods of disposal and resource recovery; and finally, that the extension of the lifespan of existing landfills resulting from the exclusion of out-of-state waste could be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. *Id.* at 625. The Court also heard contrary argument that the legislative purpose of the Act was primarily financial: to forestall the day when, owing to the exhaustion of their own landfills, New Jersey cities would have to transport their waste to more distant and expensive sites. The Court found it unnecessary to pass on the legislative purpose of the Act.

> Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627 (emphasis in original).

The impact of *Philadelphia* v. *New Jersey* on the instant case is clear. Whatever the justification for its action, no matter how legitimate its local interest, New

Hampshire may not seek to advance its local interests by erecting barriers to interstate commerce.

The court below sought to distinguish the PUC's reservation of the entire economic benefit of this commerce to New Hampshirites from the actual termination of the commerce on the ground that the energy will physically continue to flow in transmission lines to Massachusetts and beyond. J.S. Ap. 11a. Such a distinction, if accepted, would constitutionally permit a State discriminatorily to tax an article of commerce on export to the full extent of its value, as long as that State did not actually prohibit the physical flow of the commerce. Clearly, no such result would be permissible. It is impossible to separate the economic value of an article of commerce from the article itself. Were the resource here at issue coal, New Hampshire would be unable to obtain for itself the entire economic benefit of that commodity without the prohibition of its physical traffic. Only the unique physical properties of electricity ostensibly permit the distinction which the New Hampshire Supreme Court invokes. The manner of impact on interstate commerce is of no consequence in this dispute. *Philadelphia* v. *New Jersey, supra* at 628. "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Ibid.*

The sole purpose for New Hampshire's action is to protect the economic welfare of its electrical consumers.[7] The above authorities make it clear that the pursuit of domestic economic protectionism cannot

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[7]As stated by the court below:

> The economic needs of New Hampshire consumers are such that the public good requires that the hydroelectric power be delivered for their use instead of being exported.

legitimize such a manifest barrier to interstate commerce as has been erected by New Hampshire. New Hampshire's recognition of the constitutional infirmity of its action led to its reliance upon Section 201(b) of the Federal Power Act as a congressional grant of the authority to interrupt interstate commerce in this manner. As Customers will demonstrate, this reliance is misplaced.

II.
SECTION 201(b) OF THE FEDERAL POWER ACT DOES NOT CONFER UPON NEW HAMPSHIRE THE AUTHORITY TO IMPEDE, OBSTRUCT, OR REGULATE INTERSTATE COMMERCE IN HYDROELECTRIC ENERGY PRODUCED WITHIN ITS BORDERS.

New Hampshire, through the actions of its Public Utilities Commission, has undertaken the extraordinary step of refusing to permit the export of electricity generated within New Hampshire by hydroelectric units from the State. While the evil of this erected barrier to the flow of electrical current is extreme, New Hampshire's action is in some respects even more far-reaching: it would essentially require the transfer of ownership rights to electricity and (presumably) the substitution of other and alternative rights from non-hydroelectric units. The Commission claimed

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J.S. Ap. 14a. *Contrast, Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928), wherein this Court held:

> A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.

jurisdiction over export of hydroelectric energy under NH RSA 374:35. The Commission also recognized that it would be without jurisdiction to impede the flow of resources in interstate commerce but for its interpretation of Section 201(b) of the Federal Power Act. J.S. App. 25a-26a.

In sustaining the Commission's action, the court below was equally cognizant of New Hampshire's ostensible intrusion into the realm of federal regulation, noting that "it might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States." J.S. App. 10a. Indeed, the New Hampshire Supreme Court sought to distinguish the numerous cases in which this Court "has ruled that parochial State laws that impede the flow of goods or natural resources into interstate commerce are infirm under the commerce clause" on the ground that "none of them involved the *express consent* of Congress in the exercise of its commerce power." J.S. App. 11a (emphasis added). An analysis of New Hampshire's action begins, therefore, with whether §201(b) is reasonably subject to such an interpretation. A review of the language and legislative history of this provision leads inevitably to a contrary conclusion.

Preliminarily, we note that the court below sought to assert the validity of the State's action on the basis that it was simply a matter of the "assignment of the power." J.S. App. 12a. Thus the power would continue to flow on the interstate transmission grid as it had before, but the economic benefits would be stripped therefrom and "assigned" to the citizens of New Hampshire. It is not at all clear that the result, which does not regulate the export of the power, but only its price at export,

complies with the terms of that portion of Section 201(b) relied upon by the court. New Hampshire could not, of course, under the Federal Power Act, sever all electrical ties to other States, nor could it survive electrically were it to do so. We assume, however, for purposes of this analysis, that its action is a regulation of the exportation of hydroelectric energy.

Section 201(b) states, in relevant part:

> The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.*

16 U.S.C. 824(b) (emphasis added). The Commission interpreted the italicized portion of this Statute as a decision by Congress which "specifically authorized the State of New Hampshire to exercise that control." J.S. App. 19a. The court below reached the same conclusion. J.S. App. 7a-8a. It is in this language that the Commission found the "specific grant of authority," J.S. App. 20a, and the court discerned the "express consent" of Congress to the regulation of interstate commerce by New Hampshire and three other States. J.S. App. 11a. This reasoning, however, falls with an examination of its premise. Rather than creating an exception to the otherwise plenary jurisdiction of the Federal Power Commission[8] to regulate interstate

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[8]The Federal Power Commission ("FPC") is now the Federal Energy Regulatory Commission ("FERC"). For purposes of this issue, the two are interchangeable.

commerce in electricity for these four among all of the then forty-eight States by explicit words of affirmative grant, Congress chose to craft §201(b) in language of restriction. Section 201(b) is a restriction on the authority of the Federal Energy Regulation Commission. The language of this provision delimits the breadth of federal authority, expressly withholding that authority in the face of "lawful authority now exercised" by the States. Contrary to New Hampshire's interpretation, however, Congress did not purport by this language to pass on the legality or constitutionality of the state statute here at issue. As the Report of the House of Representatives in which the language in question was added makes clear,[9] this amendment simply assured that the Statute would not apply to "deprive a State of *any lawful* authority *now exercised* over the exportation of hydroelectric energy transmitted out of the State." (emphasis added).

While the words of Congressman Rogers of New Hampshire relied upon by the court below express his "hope" that Congress would grant to New Hampshire the privilege to regulate interstate commerce in hydroelectric energy generated within that State,[10] it is quite clear that Congress chose a different course.[11]

[9]H.R. Rep. No. 1318, 74th Congress, 1st Sess. 27 (1935).

[10]79 *Cong. Rec.* 10527 (1935).

[11]The New Hampshire Supreme Court's reliance upon footnote four in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 300-301 (1953) is likewise misplaced. In concluding that §201(b) did not go beyond §201(a), 16 U.S.C. 824(a), in limiting federal authority under Part II of the Federal Power Act, 16 U.S.C. 824, *et seq.*, the Court noted that the statements of Congressman Rogers *indicated* that the provision

Rather than specifically granting the authority to regulate interstate commerce, specifically analyzing the constitutional validity of the state statutes in question, Congress chose merely to avoid the issue — to preserve to New Hampshire and three other States whatever lawful authority might arguably have existed.

As demonstrated above, *supra* at 7-9, in 1935 the authority here sought to be exercised by New Hampshire clearly did not legally exist. The ability of a single State to arrogate to its citizens the benefits of its native natural resources, to the derogation of interstate commerce, had long been resolved, this Court having found that the Constitution mandates the service of national over parochial interests. *Oklahoma* v. *Kansas Natural Gas Company*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). By its decision in *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), this Court held that the States were without authority to regulate interstate wholesale rates in electricity. Viewed in this context, the intent of Congress in its choice of the language "lawful authority now exercised" in Section 201(b) becomes clear. Congress chose not to analyze the legitimacy and constitutionality of the state statutes in question. Congress chose, instead, to leave the question of the viability and import of those statutes to a later day. It is that question which is this day placed before the Court for resolution.

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was intended to preserve the validity of the state statutes "prohibiting or regulating the volume of" hydroelectric energy exported. *Ibid.* The Court did not, however, reach the necessary legal issue of whether those statutes were valid prior to the passage of § 201(b). The question here at issue, therefore, was not before the Court.

III.

NEW HAMPSHIRE'S ACTION CONSTITUTES AN IMPERMISSIBLE INTRUSION INTO A FIELD PREEMPTED BY PART I OF THE FEDERAL POWER ACT.

The Supremacy Clause mandates that the "Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. It is axiomatic that all state provisions which conflict with federal laws are without effect. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Federal displacement of state regulation may result in several ways.

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). So too, the displacement of state regulation will result where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Customers submit that New Hampshire's actions run afoul of these principles. New Hampshire has transgressed the FERC's plenary licensing jurisdiction under Part I of the Federal Power Act by, in effect, imposing upon the license granted to NEPCO by the FPC an additional condition which prohibits the use

by the licensee of hydroelectric energy generated by the licensed project works. New Hampshire's actions also stand as a manifest obstacle to the accomplishment of the full purposes and objectives of Congress by inhibiting and disrupting the federal licensing scheme. Either result is sufficient to compel the avoidance of New Hampshire's action.

A. Part I of the Federal Power Act Constitutes a Comprehensive Scheme of Federal Regulation Which Leaves No Room for the States to Supplement It.

Through the enactment of Part I of the Federal Power Act, Congress sought to secure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946). The Act embodies "the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects,"[12] and its legislative history evidences the broad intent "to secure federal control over all water power projects involving the utilization of the Nation's river systems."[13] Subsequent amendments to the Act sharpened the line between state and federal jurisdictions and "helped make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses" for the development of water power resources in the Nation's

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[12] *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 107 (1965).

[13] *Id.* at 108.

navigable waters. *First Iowa, supra* at 172, fn. 17.

Congress clearly recognized that the comprehensive development of the Nation's water power resources required that the development be administered by a single hand. It is for this reason that Congress determined that the comprehensive planning which the Act requires would depend upon the judgment of the Federal Energy Regulatory Commission.[14] It is in that body that the responsibility for determining the appropriate conditions upon which the Nation's water resources will be developed is vested. The FERC is to determine which proposed plan is "best adapted" to a comprehensive plan for improving or developing a waterway or waterways. In reaching its decision, the Commission must consider the impact of the project on the full spectrum of commerce interests. *Union Electric, supra* at 101.[15] While Congress expressly permitted some matters attendant to licensed projects to be subject to state regulation,[16] the authority to determine the appropriate license conditions, the primary means by which the FERC may ensure that a project is best adapted to a comprehensive development plan, rests solely with the FERC. Congress left no room for state regulation in this area.

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[14]§10(a) of the Federal Power Act, 16 U.S.C. 803(a). *First Iowa, supra* at 164.

[15]As one court noted, the "best adapted" standard "does not merely require that th elicense suit the public interest, or be appropriate, but in effect imposes a 'highest and best use' standard." *Municipal Electric Ass'n of Mass.* v. *Federal Power Commission*, 414 F.2d 1206, 1207 (D.C. Cir. 1969).

[16]See, e.g., Sections 19 (16 U.S.C. 812), 20 (16 U.S.C. 813), and 27 (16 U.S.C. 821).

The New Hampshire action here at issue imposes upon NEPCO's licenses an additional condition not imposed by the FPC and which is inconsistent with the statutory scheme of the Federal Power Act. The FPC did not deem it appropriate or necessary, in finding NEPCO's project proposals best adapted, to condition NEPCO's licenses to restrict the sale of the output of NEPCO's projects within the boundaries of the State of New Hampshire.[17] The FPC not having so conditioned these licenses, New Hampshire is disabled from acting in a manner which will impose such a requirement.

It is, of course, not necessary that the Court find New Hampshire's action inconsistent with the FERC license conditions in order to conclude it is invalid. Where, as here, Congress has so occupied the field of regulation, no room is left for even consistent state regulation. *Pennsylvania Railroad Company* v. *Public Service Commission,* 250 U.S. 566 (1919). This conclusion is consistent with the result in *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151 (1978). There the Court found that Congress intended the Nation to speak with one voice with respect to oil tanker safety design and struck down an attempt by the State of Washington to impose higher safety standards. The Court found it was clear that the federal tanker design statute left "no room for the States to impose different or stricter design requirements than those which Congress has enacted." *Id.* at 168. Congress has likewise determined that the interests of the Nation are best served if the development of its water power resources is guided by one hand. New Hampshire is legally incapable, and has been since the 1920 passage of

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[17]Since Section 10(a) requires that the project be best adapted to the "benefit of interstate or foreign commerce," the opposite conclusion would appear appropriate.

the Federal Water Power Act,[18] of adding requirements as to the use of power generated by a project licensed under Part I.

Admittedly, New Hampshire's action does not purport to be an assertion of licensing authority. New Hampshire would prefer that the PUC's Order be deemed an exercise of regulatory function unrelated to that of the FERC under Part I. J.S. App. 20a. It is by the effect rather than the form of New Hampshire's action that this Court will measure its constitutionality. *Maryland* v. *Louisiana*, ____ U.S. ____, 101 S. Ct. 2114, 2130 (1981).The PUC's Order restricts the free exercise of the franchise granted the licensee in a manner heretofore not restricted by the FERC. In light of Part I, New Hampshire is without authority so to constrain NEPCO.

B. New Hampshire's Action Stands as an Obstacle to the Accomplishment of the Full Congressional Purposes and Objectives of Part I.

The court below found that the actions of the PUC did not fall before the comprehensive statutory and regulatory scheme of Part I because, unlike the state regulation at issue in *First Iowa, supra*, the PUC's Order did not constitute a condition precedent to the grant of a FERC license. J.S. App. 5a. The New Hampshire Supreme Court therefore found there was no conflict between the federal scheme and New Hampshire's action. *Ibid.* A state action need not directly conflict with federal regulation, however, to be constitutionally infirm. If the state statute or regulation stands as an

[18]Now Part 1 of the Federal Power Act.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it likewise must fall. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). New Hampshire's action stands as such an obstacle.

New Hampshire asks this Court to accept an anomaly. The purpose of Part I is to ensure the comprehensive development of the Nation's resources to the full extent of Congress' ability to do so. *First Iowa, supra* at 180. The principal use to be developed and regulated in the Act "was that of hydroelectric power to meet the needs of an expanding economy." *Union Electric, supra* at 99. Yet New Hampshire's action, which interdicts the Nation's commerce in hydroelectric energy, is asserted to be consistent with this Congressional goal. While the legislative history of Part I evidences Congress' manifest belief that the development of the Nation's water power resources "is of paramount importance to the people of the United States,"[19] the PUC's Order gives ascendency to the local needs of the citizens of New Hampshire.

The extent to which the PUC Order disrupts the federal regulatory scheme is illustrated by its effect upon the actual authority of the FERC to condition the issuance of licenses under Part I. Section 10(a) requires as a condition for obtaining a license that a project be, in the FERC's judgment, "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce." One of the means by which the FERC may ensure that this standard is met is to condition the grant of a license upon interstate

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[19] 59 *Cong. Rec.* 241, 244 (remarks of Senator Jones in introducing the bill).

interconnections, coordination and transmission by the licensee and others.[20] The FERC may also condition the license upon sale of a portion of the output of the

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[20]The authority of the Federal Power Commission so to condition a license is clear from the hearings on the Water Power Act:

> MR. ANDERSON. Suppose you have two units in the same region, both of them asking for licenses. You have the power to refuse both licenses. Would not that power of a refusal be an implement to require an interconnection between those plants for development in a certain way?
>
> MR. MERRILL. That is true .... In issuing a license the commission could put on such restrictions or conditions as it wished and which were within the powers granted under the bill.
>
> MR. ANDERSON. Then it would be within the power of the commission under the license provision of this bill to require an interconnection between the plants as a condition to the granting of the license?
>
> MR. MERRILL. I think it would; yes.
>
> MR. LEVER. Is that so intended?
>
> MR. MERRILL. That would be covered, I think, under this general provision, page 14, section 10:
>
> > That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization.

Hearings before the Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess. 24 (March 18 to April 4 1918). *See also FPC* v. *Idaho Power Co.*, 344 U.S. 17, 23-24 (1952).

project in interstate commerce.[21] With the growing size and capacity of hydroelectric projects, the need for a project is often assessed on the basis of an interstate market. See, e.g., *Appalachian Power Co.*, 51 F.P.C. 1906 (1974),[22] wherein the FPC determined the need for a pumped storage project to be located in North Carolina and Virginia on the basis of the electrical needs of the "East Central Region of the United States." *Id.* at 1919. The PUC Order, if permitted, would require the FERC to abandon these means of ensuring the appropriate discharge of its congressional mandate in deference to the dictates of the State of New Hampshire. No such deference is necessary or permissible. *Maryland* v. *Louisiana*, ____ U.S. ____, 101 S. Ct. 2114, 2131 (1981).

The Congressional provision for the relicensing of projects whose FERC project licenses have expired further illustrates the repugnancy of New Hampshire's action to the comprehensive federal regulatory scheme

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[21] See, e.g., *Power Authority of the State of New York*, 12 F.P.C. 172 (1953), *aff'd sub nom. Lake Ontario Land Development & Beach Protection Ass'n, Inc.* v. *FPC*, 212 F.2d 227 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954), wherein the FPC found:

> Under these circumstances, it is in the national interest to develop these water resources to serve broad public interests. In order to insure conformance with comprehensive plans of development, the power should be made available not only in New York State, where the generators are to be located, but within economic transmission distance in nearby States.

Id. at 177. The FPC so conditioned that license and further reserved the authority to determine and fix the available portion of power capacity and output to be made available by the licensee to the neighboring States in the event of disagreement among the licensee and the other states. *Id.* at 192-193.

[22] *Aff'd sub nom. North Carolina* v. *FPC*, 533 F.2d 702 (D.C. Cir.), *vacated on other grounds*, 429 U.S. 891 (1976).

of Part I. Under Section 7(a) of the Act, 16 U.S.C. 800(a), no perpetual license may be granted, and, at the expiration of the original license, the FERC is to accord States and municipalities a preference in determining who should be permitted to receive a new license to operate an existing project. In Opinion No. 88, the FERC concluded that Congress intended municipal entities such as Customers to have a preference on recapture of such licenses.[23] The PUC Order here at issue would effectively preclude Customers and NEPCO from competing for the expired licenses of the six projects at issue solely because Customers and NEPCO are located on the "wrong side" of the Massachusetts-New Hampshire border. This would constitute the effective arrogation to New Hampshire of the authority and responsibility expressly delegated by Congress to the FERC to determine the appropriate licensee to develop and exploit the Nation's water resources. Such a result does violence to the Congressional statutory scheme established by Part I.

C. Section 201(b) Does Not Preserve to New Hampshire the Right to So Disrupt the Comprehensive Scheme of Part I.

The proviso to Section 201(b) is, by its terms, a limitation on the breadth of federal preemption under Part II of the Federal Power Act. As the prior discussion demonstrates, however, New Hampshire's action stands at odds with the congressional mandate of Part I. The PUC's Order intrudes into an area of regulation fully

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[23] *City of Bountiful, Utah*, 20 F.P.S. 5-921 (1980). Opinion No. 88 is currently on appeal to the United States Court of Appeals for the Fifth Circuit in *Alabama Power Co. v. Federal Energy Regulatory Commission, appeal docketed*, No. 80-7641 (Aug. 21, 1980).

occupied by Congress, which permits no coincident state regulation. The Order also severely disrupts the comprehensive federal scheme for the development of the Nation's rivers and substantially inhibits the full attainment of the purposes for which Part I was created. No one has yet to suggest that there is the slightest indication that Congress, in accepting the proviso of Section 201(b) of Part II, intended the wholesale evisceration of Part I.

IV.

NEW HAMPSHIRE'S ACTION, IF PERMITTED, WILL FRUSTRATE THE PROVISION OF EFFICIENT AND ECONOMIC ELECTRICAL SERVICE IN NEW ENGLAND THAT RESULTS FROM REGIONWIDE COORDINATION AND INTEGRATION OF GENERATION AND TRANSMISSION RESOURCES.

State attempts to protect local economic interests to the derogation of interstate commerce have been consistently rejected by the Court as tending to the economic Balkanization of relations among the States. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534 (1949). *See Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), an attempt to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition; *Foster-Fountain Packing Company* v. *Haydel*, 278 U.S. 1 (1928), an attempt to create jobs by keeping industry within the state; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), attempts to accord domestic consumers a preferred right of access to native natural resources over the consumers of other States.

In no other form of commerce is the potential harm to the national welfare from Balkanization as great as in the area of the provision of electrical energy and services. And in no other commerce is the product so naturally amenable to the interstate market. Unlike highway safety standards or health standards for the processing of milk, the question of the size, exportation, or sort of electrical generating capacity is not a subject which can even be argued to be uniquely local in character. Electrical energy is a commodity which, once produced by a generator connected to an interstate power pool, is inexorably in commerce. *Public Service Co. of Indiana,* v. *FPC,* 375 F.2d 100, 103 (7th Cir.), *cert. denied,* 387 U.S. 931 (1967); *Cincinnati Gas & Electric Co.* v. *FPC,* 376 F.2d 506, 508 (6th Cir.), *cert. denied,* 389 U.S. 842 (1967). Such energy knows no state boundaries and inevitably flows over whatever transmission facilities exist from one State to another. *FPC* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972).

The New Hampshire Commission decision prevents the free interchange of electrical resources and services. The inevitable result is a tendency toward the development of independent state generating resources designed to insure each State energy self-sufficiency, in sharp contrast to the national trend towards increased coordination and integration of electrical generating and transmission facilities. A recent report of the Economic Regulatory Administration emphasized the myriad benefits to be achieved through such action.

> *Full coordination of* planning, development, and operations is likely to reduce the capital and fuel requirements of utilities. It would facilitate implementation of policies to minimize use of scarce fuels, or to develop

> abundant natural resources. It would tend to increase overall system reliability and emergency response capability. It would spread the risk of forecast errors and construction delays. Lastly, it would decrease the incentives for acquisitions among utilities since economies of scale would be available to all participants.

National Power Grid Study, Executive Summary, Economic Regulatory Administration 15 (1980) (emphasis in original). New Hampshire's actions, in preventing the export of its hydroelectric resources, would roll back this trend. it would render significantly more difficult, if not impossible, the fully coordinated operation of New England's electrical systems, to the economic detriment of the region's consumers. The question is thus clearly placed: is the greater good served in the use of these resources for the benefit of New Hampshire, or the region as a whole? The New Hampshire decision breaks the integrated system at the New Hampshire state line and inhibits commerce across that line for the intended though most assuredly shortrun benefit of New Hampshire citizens alone. Such a result is repugnant to the Constitution.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Company comprise the following Cities and Towns of Massachusetts:

Ashburnham,
Boylston,
Danvers,
Georgetown,
Groton,
Hingham,
Holden,
Hudson,
Hull,
Ipswich,
Littleton,
Manchester,
Marblehead,
Merrimac,
Middleton,
North Attleborough,
Paxton,
Princeton,
Shrewsbury,
Sterling,
Templeton,
Wakefield,
and
West Boylston